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No. 5741

In the United States Circuit Court of Appeals for the Ninth Circuit

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTHERN PACIFIC COMPANY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF AND ARGUMENT FOR APPELLANT

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STATEMENT OF FACTS

This case arises out of a violation of Section 2 of the Federal Safety Appliance Act, prohibiting the use of cars with defective couplers, and involves the right of the trial Court, upon finding the carrier guilty, a jury having been waived (Rec. 8) to suspend judgment for the statutory penalty and in directing the Clerk of the Court to show such judgment as satisfied upon payment of the costs.

The complaint alleges that on April 18, 1928, appellee (hereafter called the defendant or carrier) hauled on its line from Merced, California, a certain

freight car, known and designated as Western Pacific box car No. 15107, and that when so hauled the coupling and uncoupling apparatus on the "A" end was so defective as to require the presence of a man or men between the ends of the cars to couple or uncouple them. (Rec. 3.)

Defendant's answer sets up no justification, nor did it attempt to bring itself within the Proviso; it simply denied "each and every allegation contained in plaintiff's complaint wherein it is alleged that this defendant violated the provisions of the Safety Appliance Act with respect to W. P. box car No. 15107, and specifically denies each and every allegation with respect thereto." (Rec. 5.)

The issues were found in favor of the Government, the Court making the following findings (Rec. 7):

Findings of Fact

> On April 18, 1928, defendant, a common carrier engaged in interstate commerce, operated on its line of railroad from Merced, California, toward Lathrop, California, over a highway of interstate commerce, its certain freight train known as Extra West 1722, containing 40 or more cars, one of which was Western Pacific Box Car 15107.
>
> At the time said car was moved out of Merced, and for a little over an hour prior thereto, the coupling and uncoupling apparatus on its "A" end was out of repair and inoperative in the manner alleged in plaintiff's complaint.

Conclusion of Law

> Defendant violated the Safety Appliance Act in so hauling said defective car out of Merced, California, for which action it is liable to plaintiff for the statutory penalty of $100.00, and judgment shall be entered accordingly.

Thereupon, the trial Court entered judgment in favor of the Government and against the defendant for the statutory penalty of $100.00 and costs. At the same time the Court, for reasons not disclosed by the Record, decided to relieve the defendant of liability for the statutory penalty, which it did in the following manner, the same being part of the Judgment (Rec. 9):

> It is Further Ordered that the judgment herein entered for the statutory penalty of $100.00 may be and hereby is suspended, and that said judgment for said $100.00 shall be entered by the Clerk as satisfied upon the payment of the aforesaid costs.

Proper exceptions were taken to such action of the Court, as disclosed by the last paragraph of the Judgment:

> It is Further Ordered that the plaintiff may be allowed an exception to the action of the Court in so suspending said judgment as to $100.00 and in ordering it satisfied upon the payment of said costs.

which exceptions are the basis of the Government's Assignment of Errors (Rec. 9):

ASSIGNMENT OF ERRORS

1. That the judgment as entered herein in this action is contrary to law and erroneous in that it provides that the payment of the statutory penalty of $100.00 entered in the same judgment in favor of the plaintiff and against the defendant was erroneously suspended.

2. That the Court erred in providing that the judgment in favor of the plaintiff for said $100.00 shall be entered by the clerk as satisfied upon payment of the costs.

3. That the said judgment is inconsistent within itself and is contrary to law, by reason whereof plaintiff prays that the judgment herein be corrected to the extent that that portion thereof suspending payment of the statutory penalty of $100.00 and ordering that the same be satisfied upon payment of costs be stricken therefrom.

QUESTION INVOLVED

In an action for the statutory penalty incurred for violation of the Safety Appliance Act, may the Court, after trial and findings and entry of judgment for the Government, suspend payment of such penalty or order the Clerk to show such judgment as satisfied upon payment of costs?

SAFETY APPLIANCE ACTS

Section 2 of the Act of March 2, 1893 (27 Stat. L., 531), reads as follows:

> That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to

> haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

The Act of March 2, 1903 (32 Stat. L. 943; Sec. 2, Title 45, U. S. Code), extended the provisions of the original Acts to apply to all cars used on the line of a railroad engaged in interstate commerce. Such amendatory Act was held constitutional by the Supreme Court. (*Southern Ry.* v. *United States,* 222 U. S. 20.)

Section 6 of the Act, as amended April 1, 1896 (29 Stat. L., 85; Sec. 6, Title 45, U. S. Code), provides "that any such common carrier * * * hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, *shall be liable to a penalty of one hundred dollars for each and every such* violation. * * *"

ARGUMENT

The purpose of the Safety Appliance Acts is to "promote the safety of employees and travelers." The Supreme Court of the United States, as well as various Courts of Appeal and District Courts, have so often called attention to this essential purpose of the Acts that it is unnecessary to quote from the several opinions of these Courts. They are all very well summarized in the opinion of the Court in the

case of *United States* v. *Southern Railway Company,* 135 Fed. 122:

> The Act is so highly meritorious, so generous in its purposes, so in harmony with the best sentiment of a humane people and a progressive government that it appeals strongly to the courts for its prompt and vigorous enforcement.

It was clearly the intention of Congress that the Acts be vigorously enforced and not left to the discretion of any administrative or judicial officer as to what violations, if any, should be overlooked or condoned. With this thought in mind, Congress expressly provided (Sec. 6) that—

> * * * it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred;

and further:

> * * * it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge.

Thus, when the Act of April 14, 1910 (36 Stat. L., 298; Secs. 11–16, Title 45, U. S. Code), was passed, Congress reiterated its determination to see that no violation of the Acts was condoned, and so provided (Sec. 5) that "nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any

United States attorney from any of the provisions, powers, duties, liabilities, or requirements'' of the former Acts.

Nowhere in the Acts is any authority given the Courts to do other than help rigidly enforce the provisions thereof, and thus carry out the full and manifest intent of the law. So, with this thought before it, the Supreme Court has repeatedly held that the law is not satisfied by even a high or the highest degree of care in a carrier's inspection of cars, but that its requirements are absolute. See:

> *St. L. I. M. & S.* v. *Taylor,* 210 U. S. 281.
> *Chicago, B. & Q.* v. *U. S.,* 220 U. S. 559.

Speaking of the arguments advanced by the carrier in the Taylor case as to the harshness of a rigid enforcement of the Acts, the Supreme Court said (p. 295):

> It is said that liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. * * * But this argument is a dangerous one, and should never be heeded where the hardship would be occasional and exceptional.

Later, when this same argument was advanced in the *C. B. & Q. case* (*supra*), the Supreme Court again rejected it as not ''open to further discussion here.'' To which it added that (p. 577) *''if the Court was wrong in the Taylor case the way is open for such an amendment of the statute as Con-*

gress may, in its discretion, deem proper." (Our italics.)

Looking at this argument of harshness from another angle—the lightness of the prescribed penalty—the Circuit Court of Appeals for the Eighth Circuit (*United States* v. *Southern Pacific Company,* 169 Fed. 407, 409) said:

> Conformity to the requirements of the law, as so interpreted, it must be admitted, will often be inconvenient and sometimes impracticable; but Congress had before it for consideration the important question of promoting the safety of employees and travelers upon railroads, and in the accomplishment of its purpose it may well be that the legislative mind considered the inconvenience and impracticability of a literal compliance at times with the law, *and the consequent infliction of the light penalties imposed for its violation to be of little moment compared with the greater importance of protecting life, limb and property. Drastic measures are frequently necessary to protect and safeguard the rights and interests of the people.* (Our italics.)

In no case decided before the 1910 Amendment, did any Court suggest that it had a right to relieve any carrier from a strict compliance with the law, even if harsh, by remitting or suspending payment of the statutory penalty. On the other hand, whatever relief could be had, said the Supreme Court, must come through Congress.

Therefore, with the view of securing relief from what the carriers termed a harsh construction, they appealed to Congress, with the result that the Act of April 14, 1910, was enacted, but even this did not, in any manner, empower a Court to suspend *incurred* penalties. All that it did was (see Sec. 4) to relieve a carrier from incurring the statutory penalty for the movement of a defective car under certain prescribed conditions, embodied in what is known as a Proviso, which Proviso is not involved in the instant case. In connection therewith, part of the Report of the Senate Committee (No. 250, Feb. 18, 1910, to accompany H. R. 5702) will be of interest:

> Prior to the passage and going into effect of the existing safety appliance laws, the largest number of casualties to trainmen from any one cause was occasioned by coupling accidents. At that time such accidents furnished more than 44 per cent of the total number of accidents to trainmen. In the year 1893, with 179,636 trainmen employed, 20,444 were killed or injured. Of this number 9,063 suffered from coupling casualties. In 1908, with 281,645 trainmen employed, the total casualties had increased to 38,165, while it is gratifying to state that the coupling casualties had been reduced to 3,385, but 8.8 per cent of the total.
>
> These figures furnish a striking example of the benefit of this act, *brought about by its passage and rigid enforcement* * * * (Our italics.)

> The amendment proposed permitting movement without penalty of a defective car to a repair shop, when necessary, is deemed advisable, as the Supreme Court of the United States, in the Taylor case, held that the present act, which this act amends and supplements, is absolute, and there is therefore grave doubt as to the right of a railroad company to move even a defective car to a point of repair without incurring the penalties of the act.

Thus, it will be seen that the only relief granted by Congress was to permit, within certain limitations, the movement of a defective car without *incurring* the penalty therefor. There was no suggestion made to Congress, nor any intimation made by it, that Courts be given the power to suspend the payment of penalties *incurred.* Nor has any Court, subsequent to the passage of the 1910 Act, except in the instant case, assumed that it had authority to nullify the penalty provision of the Act.

The right to suspend sentence in a criminal case, the result of a practice existing in the Federal Courts for many years, was finally questioned by the Government and considered by the Supreme Court in the case of *Ex Parte United States,* 242 U. S. 27. In this case, the defendant, having pleaded guilty to an indictment for embezzlement, requested the Court to suspend the five-year penalty imposed by the Act. Over the objection of the Government, District Judge Killits suspended sentence, and the question of his right to do so is

very fully discussed by the Supreme Court. Without quoting at large therefrom, the following taken from the Syllabus (p. 28) clearly sustains the contention of the Government in the instant case:

> But the courts, albeit under the Constitution they are possessed inherently of a judicial, discretionary authority which is ample for the wise performance of their duties in the trying of offenses and imposing of penalties as the laws provide, *have no inherent constitutional power to mitigate or avert those penalties by refusing to inflict them in individual cases.*

The Supreme Court went on to point out, that while at common law the courts exercised some discretion to temporarily suspend sentence, they possessed no authority to permanently suspend a sentence, nor did they claim any such authority. And what is there said about this authority in criminal cases applies with stronger force to penal actions of a civil nature.

It would therefore logically follow that neither in criminal nor civil cases have courts any authority to suspend sentences or the payment of penalties, unless so authorized by the Constitution or Acts of Congress.

Following the decisions of the Supreme Court in the case of Judge Killits (*supra*), and the *Taylor case* (*supra*), the aid of Congress was invoked to relieve the situation, and it did so. In criminal cases it gave the courts authority to suspend sen-

tences (Probation Act, Sec. 724, Title 18, U. S. Code), while in Safety Appliance cases, it relieved carriers from incurring penalties under certain conditions not involved in the instant case, but conferred no right whatever upon courts to suspend payment of penalties actually *incurred.*

If the judgment of suspension and so termed "satisfaction" of the penalty in the instant case is allowed to stand, and such practice approved by an affirmance thereof by this Court, it will seriously embarrass and cripple the Government in the administration of not only the Safety Apliance Law but other laws similar in character—the Hours of Service Law, the Locomotive Boiler Inspection Law, the 28 Hour Law, and the like, all laws designed for humanitarian ends.

CONCLUSION

Wherefore it is respectfully submitted that the lower Court was without authority either to suspend payment of the statutory penalty or to order the judgment for same shown as satisfied upon payment of the costs. The judgment of the said Court should therefore be modified accordingly.

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